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"Creating Europe": The History of European Integration and the Changing Role of EU Competition Law

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General Note about the Content

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Abstract

This paper examines the shifting meaning of European Union integration and the changing role of EU competition law – specifically within the context of European merger controls. Early pioneers of European integration like Jean Monnet viewed economic integration as a means to achieving a higher level of European political integration, of creating a uniquely European *identity* and thus avoiding future wars and conflicts. Over time, this goal of active economic integration began to give way to the goal of greater market efficiency and competition. The paper offers several explanations for this shift. The first is the success of the Single Market Program. The second is the increased role of institutions like the ECJ and the European Commission. The tools initially put into place to ensure economic integration *themselves* became a source of legal and political integration. The paper concludes by noting that the goal of economic integration is still alive and well, and may even be experiencing a resurgence as Europe begins to shift its focus from competition within the European Union to competition with the rest of the globe.

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I. INTRODUCTION: CREATING EUROPE

On May 9, 1950, a collection of photographers, journalists, and European diplomats filed into the Salon de l'Horloge in the Quai d'Orsay in Paris. French Foreign Minister Robert Schuman stood up before the crowd and announced a formal plan for pooling the heavy industries of France and her neighbors under a common High Authority. Mindful of the aggressive nationalism of the 1930s and the catastrophic violence of World War II that had followed, Schuman emphasized that the new economic community would "provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war."[1] The Schuman Plan would form the basis of what eventually came to be the European Coal and Steel Community (ECSC).

In the room with Schuman was Jean Monnet, a French statesman and future President of the High Authority of the ECSC. Though the Declaration would carry Schuman's name, it was Monnet's ideas that had animated the proposal. Monnet was a tireless advocate of European economic and political integration as a means of preventing future conflicts, both before the war and after. Already by 1943, he was warning the National Liberation Committee of French Algiers, "There will be no peace in Europe if the States rebuild themselves on the basis of national sovereignty, with its implications of

[1] Robert Schuman, "Declaration" (May 9, 1950), *reprinted in* BUILDING EUROPEAN UNION: A DOCUMENTARY HISTORY AND ANALYSIS 44, 44 (Trevor Salmon & Sir William Nicoll eds., 1997).

prestige politics and economic protection."[2] If Germany and France were to exist peacefully as neighbors, something more than another meaningless treaty was needed: "The States of Europe must therefore form a federation or a European entity that would make them into a common economic unit."[3] Monnet outlined his plan for peace in a letter to Schuman shortly before the plan for the ECSC was announced: "We have to change the course of events. To do that, we have to change the spirit of men. Words are not enough."[4]

Something like a supranational European authority—a supranational *identity*[5]—was needed to take the place of competing national interests. But such an identity could not be unilaterally imposed by treaties or agreements. Rather, the change would have to be gradual: "Europe will not be built all at once, or as a single whole: it will be built by concrete achievements which first create *de facto* solidarity."[6] Monnet told Schuman that the change would have to be "deep."[7] In order to maintain peace, Europe needed institutions; in order to build European institutions, Europe needed an identity unto itself. This slow process would start with economic integration: "We must abandon the forms of the past and embark on the road of transformation both by the creation of economic conditions on a common base and by the establishment of new authorities accepted by

[2] JEAN MONNET, MÉMOIRES 21 (1978).
[3] *Ibid*. Indeed, Monnet had lamented the impotence of the earlier Organization of European Economic Cooperation (OEEC) on precisely this point: "I could not help seeing the intrinsic weakness of a system that went no further than mere cooperation between Governments. . . . The countries of Western Europe must turn their national efforts into a truly *European* effort. This will be possible only through a federation of the West." *Ibid.* at 272-73.
[4] Jean Monnet, "Memorandum to Robert Schuman and Georges Bidault" (May 1950), *reprinted in* BUILDING EUROPEAN UNION, *supra* note 1, at 41.
[5] This is likely what Monnet meant when he referred to Europe as, above all, "a moral idea." MONNET, *supra* note 2, at 300.
[6] *Ibid.*
[7] Monnet, *supra* note 4, at 41.

national sovereignties."[8] Economic integration would promote political integration, and both would contribute to the creation of a collective European identity that would supplant the narrow, violent nationalism of the early twentieth century. The preamble to the 1952 Treaty of Paris highlights this point: "Resolved to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; . . . [the Inner Six] [h]ave decided to create a European Coal and Steel Community."[9] Monnet felt himself on the edge of an enormous change. He told Schuman, "Europe has never existed. The sum of sovereignties meeting in Councils does not make up an entity. We must genuinely create Europe, so that it reveals itself to itself."[10]

II. Early Competition Law and the Idea of Integration

a. Integration and the ECSC

Competition law would be a central component of this integration from the very beginning. As Schuman announced, "In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the [ECSC] will ensure the fusion of markets and the expansion of production."[11] Article 65 of the ECSC treaty prohibited "all agreements among enterprises,

[8] *Ibid*. at 43.
[9] Treaty Establishing the European Coal and Steel Community, pmbl., Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]. *See also* Martin Holland, European Community Integration, 7 (1993) ("It is myopic to regard the past four decades of European integration as a technocratic economic exercise principally devoted to capital expansion: the complete success of the ECSC and latterly the European Community can disguise this original purpose of creating a European organization that would prohibit the outbreak of Europe's third civil war of the twentieth century.").
[10] Monnet, *supra* note 4, at 43-44.
[11] Schuman, *supra* note 1

all decisions of associations of enterprises, and all concerted practices which would tend, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market."[12] Article 65 tasked the High Authority with making sure that cartels did not distort competition, fix prices, or divide up geographic markets as they had in the past. But efficiency was not a goal unto itself. Rather, it was subordinated to the larger goal of integrating a common European market, as both the Preamble and Article 65 made clear. Paragraph 2 of Article 65 expressly permitted competitors "to agree among themselves to specialize in the production of, or to engage in joint buying or selling of specified products," as long as the High Authority determined that other conditions had been met.[13]

b. Integration and the EEC

The antitrust provisions of the ECSC Treaty served as a basic foundation for the competition provisions of the 1957 Treaty of Rome.[14] Articles 85 and 86 were broadly analogous to Articles 65 and 66 of the ECSC Treaty.[15] Despite disagreement among the member states about levels and standards of enforcement regarding the new competition laws, the goal of integration was never in doubt: "Single market integration, and the elimination of restrictive practices which interfere with that integration, is the first

[12] ECSC Treaty, art. 65(1).
[13] ECSC Treaty, art. 65(2).
[14] And little else. *See* DAVID J. GERBER, LAW AND COMPETITION IN THE TWENTIETH CENTURY: PROTECTING PROMETHEUS 342 (1998) ("The actual operations of the ECSC competition law system had a limited impact on the development of competition law in Europe. During the initial five years of its operations, that system was little used, and thus experience under the ECSC played little role in the drafting of the Rome Treaty. During that period the Commission did not prohibit any concentrations, and its enforcement of other provisions was quite limited.").
[15] Treaty Establishing the European Economic Community, arts. 85-86, March 25, 1957, 298 U.N.T.S. 11 (now TFEU arts. 101-02) [hereinafter EEC Treaty].

principle of EEC law."[16] Article 2 of the Treaty clearly shows how the economic dictates of Articles 85 and 86 were subordinate to the overarching goal of increasing political integration and creating a new Europe: "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote through the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it."[17] David Gerber places the importance of the EEC's competition law regime within the context of the *failed* integration attempts of 1952 with the European Political Community and the European Defense Community: "To begin to appreciate the centrality and force of [the integration idea], one need only recall that economic co-operation was the last remaining hope for a co-operative Europe that would banish the specter of that continent's nationalist past. Attempts to move toward political union had been rejected and plans for a European Defense Community had been defeated. If there was to be a new Europe, it would have to be built on economic co-operation and integration."[18] Certainly the Commission was mindful of reaping the economic benefits of competition where possible,[19] but European integration remained the primary goal.

Of course, it was not always immediately clear what "promoting integration" meant in the competition/antitrust context. One contemporary academic observer noted that single

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[16] Barry Hawk, *Antitrust in the EEC—The First Decade*, 41 FORDHAM L. REV. 229, 231 (1972).
[17] EEC Treaty, art. 2.
[18] GERBER, *supra* note 14, at 347.
[19] *See, e.g.*, Commission of the European Communities, *First Report on Competition Policy*, at 12 (1972) ("Although it is evident that the competition policy of the Community must be directed towards the creation and proper operation of the common market, its effectiveness would, nevertheless, be considerably improved if it were carried out in conjunction with the more active policies at the national level.").

market integration could be "two-edged: on the one hand, the Commission and the Court have not hesitated to strike down obstacles to integration; at the same time, the Commission has adopted affirmative policies the effect of which is to encourage firms to expand their operations throughout the Common Market."[20] Regarding the former category, cases involving geographic market divisions among competitors were easy enough to deal with, since the agreements at issue ran afoul of both the express terms of Article 85 as well as the broader integration goals of the Treaty. This was true for agreements among distributors as well. Thus, in the famous *Consten and Grundig* case,[21] the ECJ had no difficulty invalidating an exclusive dealing agreement that divided the market along national lines. Such agreements were harmful—both economically (by closing off access to other national markets, Consten and Grundig were preventing competition and thus harming consumers)[22] and politically (by dividing up the market the defendants were frustrating the integration goals of the Treaty).[23]

The ECJ went even further in linking the competition and efficiency aims of Articles 85 and 86 to the political integration goals of the broader Treaty framework in its *Italy v. Commission* decision: "Article 85 as a whole should be read in the context of the provisions of the Preamble to the Treaty which clarify it and reference should particularly be made to those relating to 'the elimination of barriers' and to 'fair competition' both of

[20] Hawk, *supra* note 16, at 231.
[21] Joined Cases 56 & 58/64, Établissements Consten, S.A.R.L. v. Comm'n, 1966 E.C.R. 299.
[22] *See id.* at 343.
[23] Obviously integration has a prominent economic component, but I use "political" here to make an analytical distinction between the "pure" economic goals of maintaining competition and the more "political" goal of integration as a means of "changing the spirit of men," in Monnet's words—that is to say, integration as a means unto itself.

which are necessary for bringing about a single market."[24] Echoing the ECJ in its *First Report on Competition Policy*, the Commission warned, "Economic integration will never be fully achieved if agreements and concerted practices [to restrict competition] are not resolutely opposed. . . . If the policy of modifying state aids is unsuccessful the functioning of the Community could in the long-term be placed in jeopardy."[25] Some scholars have taken pronouncements such as these as an indication that efficiency goals and market/political integration goals are easily reconcilable.[26]

III. INTEGRATION VS. COMPETITION

And yet, in the next paragraph, the Commission announced (with no hint of irony) that the integration process was incomplete in part because "[s]ome enterprises still direct their sales efforts exclusively to their home markets. That is why the Commission *particularly encourages* cooperative efforts between small and medium-sized enterprises to establish themselves in markets other than their own."[27] Though it is quite possible that consolidations or agreements among smaller firms will result in economic efficiencies and improve competition and access to markets,[28] this is not always the case. And the larger the enterprises involved, the harder it is to justify the sort of proactive stance evident in the Commission's *Report*—at least on grounds of economic efficiency. Even more striking

[24] Case 32/65, Italy v. Comm'n, 1966 E.C.R. 389, 405.
[25] Commission, *supra* note 19, at 13.
[26] *See, e.g.*, PETER D. CAMESASCA, EUROPEAN MERGER CONTROL: GETTING THE EFFICIENCIES RIGHT 238-39 (2000) ("Ever since the ECJ's *Consten and Grundig*-case [sic], the coherence between the ultimate Community task of furthering economic efficiency in the Internal Market in accordance with the principle of an open market economy with free competition . . . and the policy means thereto of market integration . . . has been clearly established.").
[27] *Id.* at 14 (emphasis added).
[28] *See generally* MICHAEL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES (2003).

than the pro-cooperation nod toward integration in the *Report* was a memorandum published seven years earlier, when the Commission was considering the prospect of merger regulation through Articles 85 and 86.[29] The Commission noted that the European market was still developing and growing, and that large enterprises might be necessary in order for European firms to compete outside of Europe. The Commission further noted that "[i]n many cases the business structures in Europe do not yet correspond to the new orientations in the world."[30] Like the *Report*, the memorandum also announced, "Mergers which raise productivity are all the more desirable, when they take place across the borders and in the direction of an integration of markets. Towards such mergers *a generally positive attitude appears to be necessary*."[31] The memorandum proposed that Commission opposition to mergers be the exception rather than the rule.

Here we begin to see some of the difficulties inherent in the interaction between integration goals and competition laws. Though the two work in tandem in cases like *Consten and Grundig* or *Italy v. Commission*, we can imagine a scenario where political integration goals and economic competition/efficiency goals are at odds. If Firm A has an 80% market share in France and Firm B has an 80% market share in Germany, there may be little to no efficiency gains in allowing them to cooperate. In fact, it's quite possible that cooperation will allow the firms to monopolize both markets and exact a premium from consumers. And yet, from an integration standpoint, cooperation may be desirable. Perhaps this is an industry that has historically been divided along state lines, and the only way to

[29] *Concentration of Enterprises in the Common Market: Memorandum of the Commission of the EEC to the Governments of the Member States*, 1966 Common Mkt. Rep. (CCH) No. 26, part I, at ¶ 6.
[30] *Id.*
[31] *Id.*

break that division and further the cause of integration is to allow the firms to cooperate.[32] Admittedly, this is an extreme (and somewhat simplistic) hypothetical. Nevertheless, it does serve to illustrate the potential tensions between integration and efficiency goals as applied to EU competition law.[33]

IV. INTEGRATION VS. COMPETITION: THE MERGER CONTEXT

This tension is particularly acute in the merger control context.[34] Temporary agreements among competitors will rarely be justified on the grounds of integration, since they do not implicate the sort of long-term, structural changes that that are necessary for functional integration. Thus, most prosecutions of cartels or abuse-of-dominance cases can reconcile the goals of integration and economic efficiencies. Mergers, however, will often involve some level of restructuring in the market—potentially in ways that serve the aims of integration but disserve economic considerations of competition or efficiency. Oddly, very little scholarly attention has been paid to this problem.[35] Many authors ignore the

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[32] *See* European Commission, *The Single Market Review: Impact on Competition and Scale Effects*, at 23-27 (1997) (defining economic integration as a process whereby "the outcomes of economic decisions become less dependent on the existence of market borders"); *see also* JACQUES PELKMANS, EUROPEAN INTEGRATION: METHODS AND ECONOMIC ANALYSIS 2-3 (1997) (defining integration as the elimination of "frontiers" between economies).

[33] Though U.S. antitrust law is rife with its own contradictions and ambiguities, this is one political/economic conflict that it has not had to deal with: "From a political perspective, the goals of EC competition law were never purely economic—Robert Bork has no intellectual twin in Europe." GEORGIO MONTI, EC COMPETITION LAW 81 (2007); *see also* Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55, 56 (1992) ("Unlike the U.S. economy, which was largely integrated and continental in scope at the time of the passage of the Sherman Act in 1890, the EC was created in 1957 in order to establish a new European common market . . . . In part, EC competition law must play the role that the commerce clause and the supremacy clause played in the United States in creating a true Community-wide market in which to have competition at all.").

[34] The 1957 EEC Treaty contained no provision governing mergers. Though the ECJ ruled in 1973 that Articles 85 and 86 gave the Commission the power to regulate mergers, Case 6/72, Cont'l Can Co. v. Comm'n, 1973 E.C.R. 215, it wasn't until 1989 that the Commission had express power to regulate mergers. Council Regulation 4064/89, 1989 J.O. (L 395) 1 (EEC).

[35] *Cf.* Hawk, *supra* note 16, at 231.

tension or simply assume, based on the reasoning in *Consten and Grundig*, that efficiency goals and integration goals are fully reconcilable.[36] Others briefly note the potential for difficulties before waving them away in somewhat conclusory fashion. For example, Catalin Rusu admits that "concentration transactions have the ability both to promote and to hinder" either integration or competition[37] but ultimately avoids the conflict by taking the aspirational pronouncements of the Commission as objective fact: "Helpfully, for the purpose of merger control, the relation between competition policy and the Single Market Programme has been made explicit by the Commission: merger control occupies a central place in Community Competition policy; it aims to reconcile two imperatives."[38]

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[36] *See* CAMESASCA, supra note 26, 238-39. Interestingly, in the *next paragraph*, Camesasca seems to acknowledge the potential for conflict: "European competition law must, of course, be understood in the context of the need to break down the national boundaries between Member States of the Community, and to complete the unification of the Internal Market under the Single Market project. The thus required cohesion, however, carries the potential for regular conflicts with the Community's ultimate economic goal of efficiency." *Id.*; *see also* DORIS HILDEBRAND, THE ROLE OF ECONOMIC ANALYSIS IN THE EC COMPETITION RULES 16 (1998) (acknowledging that "[t]he EC integration objective results in a more permissive view of EC competition rules," but concluding that "since the *Consten & Grundig* case, the European Court of Justice has made it clear that Community rules on competition also serve integration"); Alexander Schaub, *Competition Policy Objectives*, *in* EUROPEAN COMPETITION LAW ANNUAL: OBJECTIVES OF COMPETITION POLICY 123 (Claus Dieter Ehlermann & Laraine L. Laudati eds., 1997) (asserting simply that "[t]he Treaty requires that the various fields of economic policy be coherent"). The assumption of universal consistency between these objectives can also be found outside the academic context. *See* LENNART RITTER ET AL., EUROPEAN COMPETITION LAW: A PRACTITIONER'S GUIDE 7 (2d ed. 2000).

[37] CATALIN STEFAN RUSU, EUROPEAN MERGER CONTROL: THE CHALLENGES RAISED BY TWENTY YEARS OF ENFORCEMENT EXPERIENCE 73 (2010). More specifically:

> Therefore, it may be argued that the European Merger Control Policy's dual role entails two antagonistic characteristics, at least viewed from the perspective of the companies involved in a concentration transaction:
>
> – First, should the Merger Control Policy be viewed as a part of the European Competition Policy, focused on attaining consumer welfare, a negative connotation may be attached to merger control. Reference has to be made to the situations where anti-competitive mergers, leading to negative repercussions on consumer welfare, will not be allowed.
> – Second, should the Merger Control Policy be viewed as a part of the European integration platform, focused on attaining societal welfare, a positive connotation is attached to merger control, in the sense that companies are encouraged to (cross-border) merge, innovation and technological progress are stimulated, etc.

Id.

[38] *Id.* (citing Commission of the European Communities, *Twelfth Report on Competition Policy* (1982); Commission of the European Communities, *Twentieth Report on Competition Policy* (1990)). For a more

It is worth noting that even the Commission itself has historically been either inconsistent or ambivalent with regard to the interaction between integration and efficiency/competition goals in the context of EU competition laws. For example, in the wake of the Merger Control Regulation, the Commission noted, "Merger control is necessary for both economic and political reasons,"[39] but otherwise made no attempt to prioritize one over the other or to clarify the relationship between political integration goals and economic competition/efficiency goals: "The process of restructuring European industry has given rise and will continue to give rise to a wave of mergers. Although many such mergers have not posed any problems from the competition point of view, it must be ensured that they do not in the long run jeopardize the competition process, which lies at the heart of the common market and is essential in securing all the benefits linked with the single market."[40]

Even after nearly a decade of merger enforcement, the Commission was still hinting at a certain level of incoherence between "integration" and "competition." In his foreword to the 1997 *Report*, Commissioner Van Miert wrote about the prospect of a monetary union with some joy, explaining that "[t]he adoption of a single currency in an increasingly integrated market will generate factors that will intensify the competitive process."[41] The implication seems to be that integration would serve the goals of competition, rather than the other way around: "Competition will be greatly stimulated by

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cautious and qualified take on this reconciliation, see John H. Dunning and Peter Robson, *Multinational Corporate Integration and Regional Economic Integration*, 26 J. COMMON MKT. STUD. 103, 110-18 (1987) (arguing that corporate integration can serve the purposes of regional integration if it involves only European firms and "is prompted by a desire to overcome structural market distortions and transactional market failure").

[39] Commission of the European Communities, *Nineteenth Report on Competition Policy*, at 33 (1989).

[40] *Id.* at 33-34.

[41] European Commission, *Twenty-Seventh Report on Competition Policy*, at 5 (1997).

this trend towards more closely integrated markets."[42] And yet, just a year later, Van Miert was praising the Commission for its work "underpin[ning] and consolidat[ing] the operation of the single market, by improving market structures and taking firm action against anticompetitive practices, so as to provide a sound and healthy basis for economic and monetary union,"[43] suggesting that integration and the completion of the Single Market project was the ultimate goal.

V. MAKING SENSE OF INTEGRATION

How do we account for this conceptual muddle? One possibility is that the Commission and those tasked with enforcing EU competition law and formulating competition policy over the last five decades have simply been inconsistent—or at least that they have chosen to implement policy in a pragmatic and flexible way, determining the relative importance of integration and competition on a case-by-case basis, rather than relying on some rigid positivist hierarchy. This explanation seems plausible, and it would certainly be a justifiable policy approach. Yet it seems to ignore the fact that for much of its early life, EU competition policy was *fundamentally* concerned with integration.[44] To disregard the enormous "centrality" of integration is to ignore the first thirty years of EU competition law. David Gerber argues that the "unification imperative" was more than just a goal of EU law and policymaking. Rather, it "shaped institutional structures and competences within the system, supplied much of its legitimacy, and generated the

[42] *Id.*
[43] European Commission, *Twenty-Eighth Report on Competition Policy*, at 19
[44] *See supra* text accompanying notes 16-19.

conceptual framework for the development of its substantive norms."[45] Integration was both a goal and a means to its own end.

Lest we start looping endlessly back on ourselves trying to chart the development of integration as both a means and an end, it might first be helpful to unpack what we mean when we talk about "integration" in the competition law context. After all, "integration"—like "competition"—is not a fixed, objective category: "Competition is an abstract concept. It represents neither a concrete 'thing out there' nor a 'natural' category, but a cultural construct. One can 'see' something called 'competition' only where one's language, training and experience give that concept meaning."[46]

It seems that some of the conceptual muddle noted above is due to the fact that there are often *two* notions, two levels, of integration at work. Recall that Monnet's ultimate goal in formulating a plan for a coal and steel community was not economic integration per se. The ECSC was a means to an end. Monnet wanted to forge a permanent peace in Europe, and to do that he realized he would have to create a new European *identity*—one that would supplant the often-violent nationalist ties of the past and bring Europeans together peacefully to work toward common goals. The ECSC started that process by binding the Six together in an economic union. Thus, Schuman declared, "[t]he solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible."[47]

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[45] GERBER, *supra* note 14, at 347.
[46] *Id.* at 10. Gerber also notes that "[i]ncreasing recognition of the process of competition, particularly among political decision-makers, has been a critical factor in the development, implementation, and success of competition law ideas," the importance of which we will see shortly.
[47] Schuman, *supra* note 4, at 44.

In other words, first-order (economic) integration was for Monnet a means for achieving second-order (political)[48] integration, and thus European peace. The ECSC, the EEC, and later treaties that followed gave the fledgling Community the legal and political tools needed to promote this first-order integration, and thus indirectly promote the second-order integration envisioned by Monnet and Schuman: "Both the European Commission and the European Court of Justice have used competition law as an important tool to complete the integration of the European market and forge a European identity."[49] By drawing a distinction between these two "levels" of integration, we can more easily see how market integration is both a means and an end, an economic and a political objective: "First, [integration] increases competition; second, effective competition promotes and facilitates market integration. . . . In the Community, market integration has not only been an 'ultimate' or indirect objective of competition policy, but also a direct enforcement criterion."[50]

[48] I call this integration political here, but Monnet's conception of creating a new European identity makes this almost psychological or ideational.

[49] Spencer Weber Waller, *National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law*, 18 CARDOZO L. REV. 1111, 1120 (1996); *see also* R.B. BOUTERSE, COMPETITION AND INTEGRATION—WHAT GOALS COUNT? EEC COMPETITION LAW AND GOALS OF INDUSTRIAL, MONETARY, AND CULTURAL POLICY 7 (1994) ("I consider it worthwhile to distinguish between two types of policy integration: common policies formulated with a view to establishing free trade (economic integration) and common policies formulated with a view to the establishment of a new community (that is, a political union). . . . If one then reads the EEC Treaty from its first to its last provision, one sees that the provisions on market integration precede those on policy integration. A mere reading of the system of the EEC Treaty shows that the goal of economic integration is to evolve from market into policy integration.").

[50] Schaub, *supra* note 36, at 126.

VI. THE FALL OF INTEGRATION, THE RISE OF EFFICIENCY

a. The Success of the Single Market

Yet we still have not answered our initial question: if second-order integration was the supreme goal of competition law and policy, why do we see so much conceptual ambiguity in the 1980s and 1990s regarding the relationship between efficiency/competition and integration? The short answer is: circumstances changed. Specifically, two things changed. First, economic integration was wildly successful. By the mid-1990s, the Single Market was a reality and a single currency—seemingly the capstone achievement of market integration in Van Miert's eyes[51]—was not far off. Of course, if an integrated market has been largely achieved, that raises the question of whether *affirmative* integration of the market by political actors is still necessary:[52] "In the current timeframe, markets have been largely integrated. This raises the question whether we should continue to use competition rules as a direct mechanism to ensure market integration, or whether we can now rely on indirect mechanisms, i.e. protecting the process of effective competition in order to create market structures which contribute to the objective of market integration."[53]

R.B. Bouterse points out that even from an etymological standpoint, the goal of market integration seems to have been achieved: "The new frontier which the new EC Treaty marks, is apparent from the alteration in the name of the Community. According to Article 1 EEC, the full name of the Community was 'The European *Economic* Community.' According to Article G/A/1 EC new, it now reads 'The European Community.' The alteration in name implies that the Community is to evolve into a

[51] *See supra* text accompanying notes 39-41.
[52] *Cf. supra* text accompanying notes 27-31.
[53] Schaub, *supra* note 26, at 126-27.

sociopolitical entity—away from a strict economic one."[54] This is not to say that maintaining market integration is unimportant after the 1989 Merger Regulation or after TEU—only that *active* market integration (e.g., in the form of a more merger-friendly policy) on the part of European policymakers is no longer as central as it once was.

b. Integration Through Other Means

Another explanation for the shift away from active market integration may lie in the tools of integration themselves—i.e., in the legal and political institutions that were initially tasked with promoting first-order integration. As Monnet was well aware, economic integration was only one means of binding the member states to one another through shared, central institutions and common interests. Though Monnet saw economic integration as the only real possibility at the time,[55] he and Schuman realized that economic integration was only a first step. Legal and political integration would eventually follow and encourage second-order integration.[56] And indeed that is what happened: The ECJ centralized the lawmaking process and became sole arbiter of EU law—including competition law—, while the Commission replaced the national authorities as the central enforcer of competition law and competition policy.[57] By a process of gradual, functional

[54] BOUTERSE, *supra* note 49, at 9.
[55] Recall Bouterse's formulation of "two types of policy integration: common policies formulated with a view to establishing free trade (economic integration) and common policies formulated with a view to the establishment of a new community (that is, a political union). The goals of the latter type of common policies need not necessarily boil down to free trade but rather to other goals necessary for establishing forms of cooperation between national economies." BOUTERSE, *supra* note 49, at 7.
[56] *See generally* ANTJE WIENER & THOMAS DIEZ, EUROPEAN INTEGRATION THEORY (2004) (providing a general overview of the various types of European integration theories as well as the functionalist approach to European integration).
[57] For an overview of competition enforcement at the national level, before the Commission assumed its central role, see GERBER, *supra* note 14, at 165-265.

evolution, the tools initially put into place for implementing first-order integration *themselves* became a force for first-order integration. Thus, we can extend Gerber's observation regarding the "perception" of competition to various forms of integration: Increasing recognition of the process of making/enforcing and interpreting laws by promoting economic integration will in turn promote legal and political integration and (indirectly) second-order integration.[58]

VII. THE RETURN OF ECONOMIC INTEGRATION

With active market integration on the wane, we might expect an emphasis on pure economic efficiency or the promotion of perfect competition to have taken its place as the dominant competition paradigm. But that has not happened. Efficiency has not become an end unto itself.[59] Additionally, market integration can promote more than the sort of second-order integration that Monnet and Schuman were so concerned with. The Commission recognized this as early as 1990. In its annual *Report on Competition Policy*, it announced that "as long as dominant positions are not created or reinforced, mergers may serve to facilitate greater interpenetration of geographic markets that may not have previously been subject to the full effect of the competition from other Member States."[60] As globalization took off in the early 1990s and national markets expanded into or were swallowed up by enormous international markets, the Commission began to put increasing emphasis on the flexibility of the competition laws—the merger controls in particular.

[58] *Cf. id.* at 10.
[59] *But see* CAMESASCA, *supra* note 26, at 240 ("Market integration is thus never a goal in itself."); RUSU, *supra* note 37, at 73 ("[O]ne should bear in mind that market integration is never a goal in itself but a policy means to achieve the Community's goal of welfare enhancement."). If it is not already abundantly clear, I think both authors have taken a somewhat myopic view of "integration."
[60] Commission, *Twentieth Report*, *supra* note 38, at 14-15.

Shortly after the signing of the Maastricht Treaty (later the Treaty on European Union), the Commission seemed to hint at a return to market integration, acknowledging that "the context within which competition policy is applied is not a new phenomenon, but stems from the fact that competition is an instrument of *Community policy*. Since the beginning of the Community, competition policy has helped pursue fundamental Community goals."[61] But it was also quick to point out that "the adaptation of policy to a rapidly changing world is an on-going and continuous process. Of course there are underlying principles that remain, and these are enshrined in the Treaty, but they cannot be applied mechanically without reference either to the context within which they have their impact or the main objectives and priorities of the Community."[62] As world markets changed, so to did the goals of the competition laws.

Even Commissioner Van Miert, for all his seemingly inconsistent back-and-forth on the relationship of economic competition/efficiency to political integration, recognized the paramount importance of flexibility in the merger process, proclaiming that "[b]oth Community and national competition policy have a vital role to play in ensuring that product and service markets are flexible so that European consumers will truly benefit from the common currency."[63] Van Miert expressed great confidence in the new monetary system and the increasingly global world in which Europe found itself: "The broadening of geographic markets offers new opportunities to exploit economies of scale and will lead to an increase in merger and acquisition activity. This will be true especially for industries where sales networks have previously been confined largely within national boundaries,

[61] European Commission, *Twenty-Third Report on Competition Policy*, at 14 (1993) (emphasis added).
[62] *Id.*
[63] Commission, *supra* note 43, at 25.

and where companies see prospects of obtaining major cost savings by enlarging these to a European scale."[64] Nonetheless, he recognized that the competitive threat to Europe was no longer from within, but from *without*. Global markets would relentlessly test Europe's industries: "[C]ompetition will expose the weaknesses of less efficient companies, which will become vulnerable to takeover bids."[65] Strong integration of the internal market is thus still at the heart of EU competition law. Unlike the initial decades of inward-facing integration under the ECSC and EC, however, market integration is now facing outward. Rather than "changing men's spirits," the purpose of market integration now is to make a consolidated and solidified Europe globally competitive.

[64] *Id*. at 24
[65] *Id.*